Supreme Court, U.S.
FILED
MAR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

A & A CONCRETE, INC., an Arizona corporation, and KAYLE ADAMS and SANDY ADAMS, his wife,

Petitioners,

vs.

THE WHITE MOUNTAIN APCHE TRIBE, dba WHITE MOUNTAIN APACHE DEVELOPMENT ENTERPRISE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN P. OTTO
45 West Jefferson, 5th Fl.
Phoenix, Arizona 85003
(602) 252-7461
Attorney for Petitioners

QUESTIONS PRESENTED

CAN THE COURT OF APPEALS FOR THE NINTH CIRCUIT DISMISS A CLAIM BASED UPON 42 USC §1983 AND PENDENT CLAIMS WHERE THE CRITICAL ISSUE IS THE JURISDICTION OF THE WHITE MOUNTAIN APACHE TRIBAL COURT OVER A NON-INDIAN/NON-RESERVATION RESIDENT ON THE AUTHORITY OF NATIONAL FARMERS UNION INSURANCE COMPANY v. CROW TRIBE, 471 U.S. ____, 85 L.Ed.2d 818, 105 S.Ct. 2447(1985) WHEN THE TRIBAL CONSTITUTION CLEARLY DEPRIVES THE TRIBAL COURT OF JURISDICTION OVER BOTH THE SUBJECT MATTER AND THE PERSON?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
GROUNDS OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF PROCEDURE INVOLVED	2,3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
THE COURT OF APPEALS WAS AT A MINIMUM REQUIRED TO REMAND THIS MATTER TO THE TRIAL COURT TO DETERMINE WHETHER OR NOT THE TRIAL COURT SHOULD RETAIN JURISDICTION AND REFER IT TO THE TRIBAL COURT OR IN THE ALTERNATIVE, COULD PROCEED WITH THE CASE WITHOUT REQUIRING THE EXHAUSTION OF TRIBAL REMEDIES	17
CONCLUSION	20
APPENDIX "1"	21-25
APPENDIX "2"	36-40

TABLE OF AUTHORITIES

Cases	Page
In re Murchison, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955)	14
Johnson v. Chilkat Indian Village, 457 F.Supp. 384, (D.Ak. 1978)	14,16
McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963)	9
Monroe v. Pope, 365 U.S. 167, 81 S.Ct. 1433, 10 L.Ed.2d 622 (1963)	9
National Farmers Union Insurance Company v. Crow Tribe, 471 U.S. __, 105 S.Ct. 2447 (1985)	4-6,8-9 17, 19-20
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209, 98 S.Ct. 1011 (1978), 55 L.Ed.	16
Parker Drilling Company v. Metlakatla Indian Community, 41 F.Supp.2d 1127 at 1137 (Ak. 1978)	8
Rolf v. Burney, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897)	17
United States v. Adams, (U.S. District Court for the District of Arizona, No. 80-202-TUC-JAW)	4
Ward v. Monroeville, 409 U.S. 57, 93 S.Ct. 80, 35 L.Ed.2d 267 (1972)	16
Worcester v. Georgia, 31 U.S. (6 Pet) 515, 559, 8 L.Ed. 483 (1832)	16

STATUTES

42 USC §1983
28 USC §1331

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

A & A CONCRETE, INC., an Arizona corporation, and KAYLE ADAMS and SANDY ADAMS, his wife,

Petitioners,

vs.

THE WHITE MOUNTAIN APCHE TRIBE, dba WHITE MOUNTAIN APACHE DEVELOPMENT ENTERPRISE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To The Honorable Supreme Court of the United States:

COMES NOW A & A Concrete, Inc., an Arizona corporation, and Kayle Adams and Sandy Adams, his wife, as Petitioners, pursuant to Supreme Court Rule 21 and submit the following in support of

their Petition for Writ of Certiorari to review a decision and judgment of the Court of Appeals for the Ninth Circuit.

REFERENCE TO OFFICIAL REPORTS

The offical reference to the decision of the Court of Appeals is: An as yet unreported decision, ____ F.2d ____ (1986), contained herein as Appendix "1".

GROUNDS OF JURISDICTION

The jurisdictional basis upon which this petition is founded are:

1. The Decision of the United States Court of Appeals for the Ninth Circuit.

2. The jurisdiction of this Court is invoked under 28 USC §1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF PROCEDURE INVOLVED

Provisions of law applicable to the case are:

a. 42 USC §1983

b. 28 USC §1331

c. The due process clause of the Fifth Amendment to the Constitution of the United States

d. White Mountain Apache Tribal Code, Sections 21.1, 14.7, 14.6

(All as reproduced in Appendix "2")

STATEMENT OF THE CASE

The Court of Appeals for the Ninth Circuit held (Appendix "1") that this Court's holding in National Farmers Union Insurance Company v. Crow Tribe, 471 U.S. ___, 105 S.Ct. 2447 (1985) precluded the Plaintiffs below from testing the jurisdiction of the White Mountain Apache Tribal Court without exhausting tribal court remedies.

The Ninth Circuit further held that denial of the Plaintiffs' Cross-Motion for Summary Judgment based upon res judicata, collateral estoppel and issue preclusion was proper because the interests of the White Mountain Apache Tribe were not so similar to those of the federal government in United States v. Adams, (United States District Court for the District of Arizona, No. 80-202-TUC-JAW) as to bring to bear on this case the principles applicable under those doctrines as applied in the federal courts.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals directly conflicts with the decision of this Court in National Farmers Union Insurance Company v. Crow Tribe, 471 U.S. ___, 105 S.Ct. 2447 (1985) and the cases pertaining to exhaustion of remedies under 42 USC §1983 as well as the settled principles of res judicata, collateral estoppel and issue preclusion applicable in the federal court.

This case has been pending since 1979. It has twice been dismissed by the District Court. The second time without discussion or opinion and has twice been appealed to the Court of Appeals for the Ninth Circuit. The first appeal resulted in a reversal of the Trial Court's dismissal of the Complaint and the case was remanded to the District Court to proceed. Thereafter, the Defendants made a Motion for Summary Judgment which was granted without discussion or opinion. The Ninth Circuit affirmed thus leaving the Plaintiffs, Petitioners here, without any remedy in any court despite the fact that Plaintiffs have never been paid for the material fur-

nished to the White Mountain Apache Housing Authority. The Plaintiffs were driven from the reservation by the actions of the Defendant, Charles Patterson, and due to Writs of Execution issued out of the Tribal Court were deprived of substantial equipment and due to Writs of Garnishment served upon a non-Indian contractor who was building a high school on the Indian reservation, the Plaintiff was deprived of his contractual right to aproximately $300,000.00 in profit that he would have made pouring concrete for that contactor. When the Writ of Garnishment was served, the non-Indian Contractor immediately terminated his contract with A & A Concrete, the Plaintiff corporation which is wholly owned by the individual Plaintiffs, Mr. and Mrs. Kayle Adams.

The Ninth Circuit, in deciding the case below, recognized that federal question jurisdiction attaches when the jurisdiction an Indian Tribal Court is called into question. (Slip Opinion, at pg. 6 of Appendix "1" hereto)

Apparently, the Court of Appeals felt that it was bound to affirm the trial court by virtue of the quote from this Court's Opinion in National Farmers Union Insurance quoted on page 7 of the

Slip Opinion (Appendix "1", pg. 7):

> "The existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions."

The Court of Appeals ignored the fact that none of these factors are relevant to the factual posture which is undisputed in this case. That is the pertinent portion of the tribal constitution creating the tribal court provides:

> "Section 21.1 Jurisdiction.
>
> The Tribal Court of the White Mountain Apache Tribe shall have jurisdiction over all civil suits wherein an Indian or a member of the White Mountain Apache Tribe is a party. In cases of divorce, the Tribal Court shall have jurisdiction where either the Plaintiff or Defendant is an Indian who is a bonafide resident of the Fort Apache Indian Reservation.
>
> Section 21.2 Acts Submitting to Jurisdiction; Process. (Here, the Constitution contains what amounts to a purported, procedural long-arm statute, which does not grant or create subject matter jurisdiction, but is merely, in substance, an enactment of the Arizona Rule of Civil Procedure 4(e) which is a procedural device for obtaining personal jurisdiction over a Defendant who has a sufficient nexus with the reservation to subject him to long-arm jurisdiction)

> Sub-section (e) This section shall not be construed to extend the jurisdiction of the Tribal Court to suits where no party to the case is an Indian or a member of the Tribe." (Emphasis supplied)

This Court said in Footnote 21 in the National Farmers Union Insurance case:

> "We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction 'is motivated by a desire to harass or conducted in bad faith,' Cf. Juidice v. Vail, 430 U.S. 327, 338, 51 L.Ed.2d 376, 97 S.Ct. 211 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."

Here, it is patent that applying the test mandated by National Farmers Union Insurance Company that the jurisdiction of the Tribal Court is patently prohibited where no party to the case is ... "an Indian or a member of the White Mountain Apache Tribe". To say that an Indian tribe can be a member of itself is a contradiction in terms. As pointed out by the Court in Parker Drilling Company v. Metlakatla Indian Community, 41 F.Supp.2d 1127 at 1137 (AK. 1978):

> "Defendant first contends that the Section 17 Corporation (an Indian corporation for and under the Indian Reorganization Act) is not an 'Indian' within the terms of this statute so that it does not apply to confer jurisdiction abinitio. The Court agrees with this proposition."

Thus, this case comes squarely within the exception created by this Court in National Farmers in Footnote 21 and does not require the exhaustion of tribal court remedies when the tribal constitution itself does not even purport to confer subject matter jurisdiction on the tribal court.

There is yet another reason why exhaustion should not be required in this situation. This Court recognized in Footnote 21, 105 S.Ct. at 254 in the National Farmers case that under appropriate circumstances, that exhaustion would not be required. It has long been settled under the Federal Civil Rights Act, 42 USC §1983 that exhaustion of administrative remedies or exhaustion of state court remedies is not required. Monroe v. Pope, 365 U.S. 167, 81 S.Ct. 475, 5 L.Ed.2d 492 (1961) and McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963).

While we recognize that this is a sui generis case in the sense that a tribal court is unique almost unto itself, the closest possible analogy that can be drawn is to that of an administrative tribunal, or one more step removed, a decision of a state court. Under the teaching of Monroe and

McNeese, when dealing with federall protected constitutional rights, exhaustion is not required. The rationale bohind this rule is well stated in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). There, the Court said:

> "It is no answer that the State has a law which if been forced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and by-laws outlaws unreasonable searches and seizures is not barrier to the present suit in the federal court."

Applying this rationale to the case at hand, the Ninth Circuit's holding that the Petitioner's here are required to exhaust their tribal remedies before resorting to federal court in order to protect their rights under §1983 does not comport with the swift and sure federal remedy granted by the Civil Rights Act. This is particularly brought to bear on this case when one recognizes that by the very terms of the tribal constitution the tribal court does not have jurisdiction over the subject matter of this suit nor of Mr. and Mrs. Adams or their corporation by virtue of the clear provisions of the tribal constitution which only grants jurisdiction to the tribal court in cases

where one of the parties is an Indian. (Tribal Code, Appendix "2")

Finally, all of the arguments which militate in favor of exhaustion of either administrative or state court remedies apply equally to the exhaustion of tribal court remedies. This Court has firmly rejected those arguments almost from the beginning. Monroe, supra. And it is respectfully submitted that they should be rejected when dealing with the White Mountain Apache Tribal Court on the same basis. Ergo exhaustion of tribal court remedies is not required in the present posture of this case.

The Petitioners challenged in both the trial and the appellate court below the ability of the tribal court to afford due process under any circumstances because of the total lack of qualifications or legal training required of White Mountain Apache tribal judges. The Court of Appeals on page 10 of the Slip Opinion brushed aside this due process challenge by saying that the Petitioners did not challenge the qualifications of Judge Goseyun in the tribal court. The Court on page 11 of its Opinion relied upon §14.7 of the Tribal Code permitting disqualification of the

judge on the basis of lack of legal training or ability to conduct a fair trial within the parameters of the 5th Amendment. The totality of §14.7 reads as follows:

> "Section 14.7. Disqualification of Judge to Preside over a Case.
>
> A. No judge shall hear or determine any case in which he has a direct interest or wherein a party or counsel for a party is one of the following relatives:
>
> 1. Uncle or Aunt;
> 2. Neice or Nephew;
> 3. Grandparent or Grandchild;
> 4. Brother or Sister;
> 5. Mother or Father; or
> 6. A spouse of one of the preceding
>
> B. The disqualifications in Sub-section A of this section shall apply whether or not the relationships are based on the whole or half blood, adoption or remarriage.
>
> C. Any party to a proceeding may raise the issue of the qualification of the judge to hear the case."

It is immediately apparent upon reading the above quoted section of the tribal code that the only basis on which a party to the case may challenge the qualifications of the judge is if the judge is related to the other party to the case in the degrees enumerated in Sub-sections A and B. Sub-section C creates no basis other than those specified in Sub-sections A and B upon

which to challenge the qualifications of a judge.

Section 14.6 of the Tribal Code sets forth the only qualifications required to be a judge of the Tribal Court and specifically sets those out as follows:

> "Section 14.6. Qualifications.
>
> Any person over the age of 21 years shall be eligible to serve as a judge of the White Mountain Apache Tribe if he:
>
> 1. is a member of the White Mountain Apache Tribe;
>
> 2. has never been convicted in any court of a felony; and
>
> 3. has not been convicted of a misdemeanor in any court within one year prior to his election, with the exception of minor traffic offenses."

If such a court as so constituted and with the disqualifications being limited to those who are related by blood, adoption or remarriage to the necessary qualifications in order to afford a minimum of due process as that term is known to the Anglo-Saxon law flies in the face of reality, reason and the minimum of a fair trial in a fair tribunal. The Court will note that §14.7 of the Tribal Code does not even provide for the disqualification of the judge for cause or for bias or prejudice.

The White Mountain Apache Tribal Courts have no legally trained judges. One test of the validity of the tribal court system is the existence of an independent court of appeals to which an appeal may be taken. Johnson v. Chilkat Indian Village, 457 F.Supp. 384, (D.Ak. 1978). The testimony of Anna Goseyun, the Chief Judge of the Tribal Court at the time the events occurred, which are the subject matter of this suit, demonstrated that no such independent appeals court existed. Judge Goseyun appointed the appellate judges to hear appeals from her court. Mrs. Goseyun testified in her deposition on page 32 that she has the power to deny an appeal merely by not appointing any appellate judges. She further testified that she was the Chief Judge of the Tribal Court for four years and that there was one other judge and that she had no idea whether he had any legal training or even what his educational background was. She was the one who appointed the appellate judges and all of the judges who were to review any case which she decided were appointed by her. (Depo. of Goseyun, pgs. 24-29)

This Court in In re Murchison, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955), in deter-

mining the requisite minimum due process requirements for a court, defined the constitutionally mandated minimum which a true court must afford as follows:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that:
>
> 'Every procedure which would offer a possible temptation to the average man as a judge *** not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13." (Emphasis ours) (See the testimoney overall of Mrs. Goseyun)

To state that a member of the Tribe, (as a tribal judge must be) who is elected by the tribal council (Sec. 14.6 of the Tribal Code) and who can be removed or not reappointed by

the council, can preside over a claim by the Tribe itself against a non-Indian in a case where the Tribe seeks to recover $250,000, is to violate by definition the requirement of a "fair trial in a fair tribunal" enunciated by the Supreme Court in Murchison, supra, and its progenitors and progeny.

The cases are legion requiring that due process requires more than is provided by the Tribal Court, e.g., Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209, 98 S.Ct. 1011 (1978), 55 L.Ed. Ward v. Monroeville, 409 U.S. 57, 93 S.Ct. 80, 35 L.Ed.2d 267 (1972). As to the requirement of an Indian Court of Appeals, see Johnson v. Chilkat Indian Village, 457 F.Supp. 348 (Ak. 1978)

We agree that Indian tribes are "distinct, independent, political communities retaining their original natural rights" in matters of local self government. Worcester v. Georgia, 31 U.S. (6 Pet) 515, 559, 8 L.Ed. 483 (1832). Insofar as non-Indian citizens of the various states are concerned; notwithstanding federal authority over both, as between a citizen and an Indian tribe, the tribe stands as a subjugated sovereign. While it has the power to

make its own substantive law with respect to internal matters, Roff v. Burney, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897), it has no power to create a Tribal Court that abridges the constitutional rights of non-reservation, non-Indian citizens of the United States.

The Court of Appeals' reliance on Section 14.7-C of the tribal code to dismiss the constitutional challenge that no non-Indian can receive a fair trial in the tribal court, commensurate with any semblance of due process is sophistry.

THE COURT OF APPEALS WAS AT A MINIMUM REQUIRED TO REMAND THIS MATTER TO THE TRIAL COURT TO DETERMINE WHETHER OR NOT THE TRIAL COURT SHOULD RETAIN JURISDICTION AND REFER IT TO THE TRIBAL COURT OR IN THE ALTERNATIVE, COULD PROCEED WITH THE CASE WITHOUT REQUIRING THE EXHAUSTION OF TRIBAL REMEDIES

Even assuming, arguendo, that the Court of Appeals was correct in that the Petitioners should be required to exhaust their tribal remedies, the Court violated the mandate of National Farmers that:

> "Whether the federal action should be dismissed or merely held in abeyance pending the development of further tribal court proceedings, is a question that should be addressed in the first instance by the District Court."

The Court of Appeals on page 12 of the Slip Opinion said, "Because the District Court has already determined that dismissal rather than abeyance of the federal case is appropriate, we need not remand the case to the District Court."

By not remanding the case to the District Court, the Court of Appeals cut-off any possible remedy that the Petitioners will ever have to litigate their §1983 and pendent claims against the Respondents below. The case cannot be re-filed in the District Court as the statute of limitations has long since run. It is clearly appropriate that the District Court retain jurisdiction while referring the matter to the Tribal Court in the event that exhaustion is required. To say that the District Court had already determined that dismissal rather than abeyance of this case was appropriate is non-sense. The District Court determined no such thing. The District Court granted summary judgment without opinion and without any statement in the record as to the reasons for

dismissal. This occurred on the 16th day of May, 1985. This Court's decision in National Farmers was not even rendered until June 3, 1985. This was long after the District Court had dismissed the case without ever considering this Court's determination that federal question jurisdiction gave the federal courts jurisdiction over this suit and the pendent claims as well as the §1983 claims because the federal question of the tribal court's jurisdiction was involved. To say that the District Court considered holding the case in abeyance while it referred it to the tribal court for a fuller development of the record in that tribunal flies in the face of the record and common sense.

At the very least, the Petitioners should be entitled to exhaust their tribal remedies, which no one knew they were required to do until this Court's decision in National Farmers. Their only remedy for the harm done them by the Respondents below has been eliminated by the action of the Court of Appeals.

It is respectfully submitted that this Court should correct that fundamental error.

CONCLUSION

It is repsectfully submitted that the Petition for Certiorari should be granted and the conflict between this Court's opinion in National Farmers Union Insurance Company v. Crow Tribe, supra, should be resolved and that the matter be remanded to the District Court, in the event that exhaustion is required, so that the District Court can hold this federal suit in abeyance pending a full development of the record in the tribal court.

Respectfully submitted,

JOHN P. OTTO
45 West Jefferson
5th Floor
Phoenix, Arizona 85003
(602) 252-7461
Attorney for Petitioners

APPENDIX "1"

SLIP OPINION OF UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT

pgs. 21-39

UNITED STATES COURT OF APPEALS

FOR THE NITH CIRCUIT

A & A CONCRETE, INC., KAYLE ADAMS and SANDY ADAMS,	)	No. 85-2165
Plaintiffs-Appellants,	)	D.C. No. C-79-0667-PHX-WEC
v.	)	
THE WHITE MOUNTAIN APACHE TRIBE, CHARLES A. PATTERSON, VIOLET PATTERSON, KENNETH PATTERSON, SHIRLEY PATTERSON, et al.,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court for the District of Arizona
Walter E. Craig, District Judge, Presiding

Argued and submitted January 17, 1986
San Francisco, California

Before: SNEED, ANDERSON, and ALARCON, Circuit Judges.

ALARCON, Circuit Judge.

Appellants A & A Concrete, Inc., Kayle Adams and Sandy Adams (collectively "appellants") appeal from the district court's grant of summary judgment in favor of the appellees, on appellants' complaint for deprivation of civil rights, conspiracy to deprive them of their civil rights, and related pendent state tort claims. Appellants also appeal

from the district court's order denying appellants' cross-motion for summary judgment predicated on res judicata and collateral estoppel grounds. Because appellants failed to exhaust their remedies in the White Mountain Tribal Court, we conclude that federal review of appellants' claims is premature and affirm.

I

In June 1978, Kayle Adams contracted with the White Mountain Apache Development Enterprise (an economic subsidiary of the White Mountain Apache Tribe) to supply concrete to a housing project to be constructed on the Fort Apache Indian Reservation for the use of tribal members. At the formation of the contract and throughout its term, the Tribe was represented by Charles Patterson, general manager of the Development Enterprise. Pursuant to the contract, the concrete was required to conform to certain strength standards.

In late 1978, Charles Patterson bought stolen heavy construction equipment. He and Kayle Adams were arrested. In February 1979, Adams told Patterson that he was going to testify against Patterson. Patterson threatened to kick Adams

off the reservation if he did so. Adams did not testify, and Patterson was subsequently acquitted of the charge.

Sometime early in 1979, the Tribe became aware that Adams had furnished substandard concrete. The substandard character of the concrete necessitated dismantling houses built on defective foundations. The Tribe withheld payment for the materials and brought an action against appellants in the tribal court for breach of contract. Appellants contend that the tribal court lawsuit was the result of a conspiracy to retaliate against Adams for threatening to testify against Patterson.

Appellants were served with the complaint by Navajo County Sheriff's deputies Charles Lane and Gene Russell, and Russell Lupe, a Whiteriver police officer and a tribal court process server. It is unclear which of these persons actually handed Adams the tribal court documents.

Upon the advice of counsel, appellants ignored the service of process and allowed the time to answer to lapse. Appellants did not enter a special appearance in tribal court or otherwise attempt to challenge the tribal court's

jurisdiction. On February 6, 1980, the tribal court entered a default judgment against appellants in the amount of $250,000 plus costs and interest.

Pursuant to a writ of execution, the Chief of Police of the Whiteriver Police Department levied on two pieces of equipment belonging to appellants. The Development Enterprise purchased both items of equipment at the court-ordered sale. On the advice of counsel, appellants entered the reservation in September 1980 and removed one of the pieces of equipment.

Kayle Adams was thereafter indicted in federal district court for theft of tribal property. These charges were dismissed by Judge James A. Walsh in December 1980, on the ground that the tribal court lacked jurisdiction to enter the default judgment in the civil suit against Adams.

On November 15, 1979, appellants filed a first amended complaint in district court against the Tribe, doing business as White Mountain Apache Enterprises, the White Mountain Apache Housing Authority (charged with administering housing construction on the reservation), Charles Patterson,

and a number of other individual defendants. The complaint alleged (1) conspiracy to deprive the plaintiffs of their civil right to due process; (2) deprivation of civil rights; (3) wrongful garnishment and levy of execution; (4) breach of contract; and (5) unlawful interference with plaintiffs' contract with a third party, Okland Construction. The complaint was dismissed for want of jurisdiction on February 29, 1980. On appeal, this court affirmed the dismissal of the complaint with respect to the second count and reversed and remanded the case with respect to the remaining claims. A & A Concrete, Inc. v. White Mountain Apache Tribe, 676 F.2d 1330 (9th Cir. 1982) (A & A Concrete I). The White Mountain Apache Housing Authority was subsequently dismissed as a party with prejudice.

On February 22, 1985, appellees moved for summary judgment. Appellants filed a cross-motion for summary judgment. On May 13, 1985, the district court granted appellees' motion and denied appellants' cross-motion.

II. STANDARD OF REVIEW

We review a district court's grant of summary

judgment de novo. Grigsby v. CMI Corp., 765 F.2d 1369, 1373 (9th Cir. 1985). We apply the same standard as that employed by the trial court under Fed. R. Civ. P. 56(c): we will affirm only if the record, read in the light most favorable to the non-moving party, reveals no genuine issues of material fact and establishes that the moving party is entitled to judgment as a matter of law. Id.

The district court's decision to deny appellants' cross-motion for summary judgment is also reviewable de novo: whether res judicata or collateral estoppel operates to bar claims is a mixed question of law and fact subject to de novo review. United States v. Geophysical Corp., 732 F.2d 693, 697 (9th Cir. 1984).

III. APPELLEES' MOTION FOR SUMMARY JUDGMENT

Appellees assert three grounds in support of the district court's summary judgment award: (1) appellants failed to exhaust their remedies in tribal court and federal review is thus premature; (2) the Tribe and its employees are immune from suit; and (3) appellants have not established the existence of state action on their section 1983 claim. The district court did not specify the

ground on which it granted summary judgment. We may affirm the district court on any basis fairly supported by the record. Hoohuli v. Ariyoshi, 741 F.2d 1169, 1177 (9th Cir. 1984) (citing Goodisman v. Lytle, 724 F.2d 818, 820 (9th Cir. 1984); United States v. 101.80 Acres of Land, 716 F.2d 727 n.24 (9th Cir. 1983)). Because we conclude that summary judgment was proper on the first ground, we do not reach the second and third grounds proffered by appellees.

Appellants contend that they were excused from their obligation to exhaust their remedies in tribal court because the tribal court lacked subject matter jurisdiction to hear the instant dispute. Appellants argue that the question whether the tribal court had jurisdiction to hear the dispute is a federal question which must be resolved by the district court.

The Supreme Court addressed this issue in National Farmers Union Insurance Companies v. Crow Tribe, 471 U.S. ____, 105 S.Ct. 2447 (1985). In National Farmers, a Crow Indian obtained a default judgment in tribal court against a school district located within the Crow reservation for damages sustained when he was struck by a motorcycle

in the school parking lot. Id. at 2449. The school district and its insurer brought an action for injunctive relief in district court, invoking the court's federal question jurisdiction under 28 U.S.C. §1331. Id. at 2450. The district court held that the tribal court "lacked subject-matter jurisdiction over the tort that was the basis of the default judgment," and entered an injunction against execution of the tribal court judgment. Id. We reversed without reaching the merits, finding that the district court's exercise of jurisdiction could not be supported on any constitutional, statutory, or common law ground. Id. at 2450 & n.3.

The Supreme Court held that the district court had jurisdiction under section 1331 over the federal question whether the tribal court had the power to compel a non-Indian property owner to submit to the jurisdiction of the tribal court, see id. at 2452; however, the existence and extent of a tribal court's jurisdiction requires an examination which "should be conducted in the first instance in the Tribal Court itself." Id. at 2454. The Court opined that Congress' commitment to a policy of supporting tribal self-

government and self-determination favors a rule "that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." 105 S.Ct. at 2454 (footnote omitted). The Court commented:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

Id. (footnote omitted). The Court reasoned that if such an examination were performed by the tribal court, a full record could be developed and other courts would benefit from the tribal court's expertise in the event of further judicial review. Id. Because the issue "[W]hether the federal action should be dismissed, or merely held in abeyance pending the development of further Tribal Court proceedings, is a question that should be addressed in the first instance by the District

Court," the Supreme Court remanded the case to the district court. Id. at 2455.

National Farmers makes no distinction between personal injury actions and other civil matters arising within the territory governed by the tribe. See id. at 2452. The Supreme Court has repeatedly recognized that tribal courts have inherent power to adjudicate civil disputes affecting the interests of Indians and non-Indians which are based upon events occurring on the reservation. See, e.g., Montanta v. United States, 450 U.S. 544, 566 (1981); Santa Clara Pueblo v. Martinez 436 U.S. 49, 65 (1978); accord, Hardin v. White Mountain Apache Tribe, Nos. 84-1912 and 84-2164, slip op. at 4-5 (9th Cir. December 27, 1985) (as amended); Snow v. Quinault Indian Nation, 709 F.2d 1319, 1321 (9th Cir. 1983), cert. denied, 104 S. Ct. 2655 (1984).

It is undisputed that the transactions which form the bases for appellants' claims occurred or were commenced on tribal territory. We have previously held that a tribal court has initial power to determine its own jurisdiction to attach property belonging to a non-Indian during a building warranty dispute involving housing built on the

reservation and paid for by the tribe's representative. See R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 985 (9th Cir. 1983) (fact that contract involved housing to be built on the reservation, to be occupied by reservation members and paid for by an agency representing the tribe, established reservation as locus of contract dispute), cert. denied, 105 S. Ct. 3476 (1985); see also Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 592-95 (9th Cir. 1983) (court upheld tribe's right to regulate conduct of automobile dealer on tribal lands in repossessing vehicles purchased by Indians off the reservation), cert. denied, 104 S. Ct. 1707 (1984).

Appellants nevertheless argue that this case falls within the narrow exception to the exhaustion requirement which the Court outlined in a footnote to the National Farmers case:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," ... or where the action is patently violative of express jurisdictional prohibitions,

> or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

105 S.Ct. at 2454 n.21 (citation omitted).

Appellants first maintain that the instant action is patently violative of express jurisdictional prohibitions contained in the Tribal Law and Order Code. Chapter II, section 21.1 of the Code provides: "The Tribal Court of the White Mountain Apache Tribe shall have jurisdiction over all suits wherein an Indian or a member of the White Mountain Apache Tribe is a party." Appellants argue that because the Tribe itself brought the action in Tribal Court and it is neither an "Indian" or "a member of the ... Tribe," the tribal court lacked jurisdiction. Appellants cite Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667 (1979) in support of the proposition that the word "person" does not include a sovereign entity. Appellants' reliance on Wilson is misplaced. In fact, Wilson supports the Tribe's construction of the Code.

In Wilson, the Supreme Court construed 25 U.S.C. §194, which provides: "In all trials about

the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person ... ." Although the Court did find that the term "white person" did not include the sovereign, it also squarely rejected the argument that the statute does not apply when an Indian tribe, rather than one or more individual Indians, is the litigant. Id. at 665, 667. The Court noted that statutes passed for the benefit of Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians. Id. at 666.

Moreover, the "[i]nterpretation of a tribal ordinance is one of the duties of a tribal court." R.J. Williams Co., 719 F.2d at 983 (holding that question whether Fort Belknap Housing Authority is a "member" of the Fort Belknap Indian Community as that word is used within tribal court jurisdictional statute is a matter for the tribal court). Appellants' arguments regarding the tribal legislature's intent are better addressed to the tribal court. See id. at n.4.

Appellants next assert that exhaustion would have been futile because they would not have been

afforded a meaningful opportunity to challenge the tribal court's jurisdiction. Specifically, appellants argue that Anna Goseyun, Chief Judge of the tribal court, was so lacking in adequate legal training and biased by her connection with the tribal council that a hearing over which she presided would violate due process standards.

Appellants' failure to challenge Goyesun for bias or on competence grounds precludes them from raising this question in the federal courts. Section 14.7(c) of the Tribal Code permits any party to challenge a tribal court judge's qualification to hear the case. Appellants' failure to raise such a challenge because they assumed that it would be unsuccessful is not equivalent to raising the issue and having it resolved against them. See White v. Pueblo of San Juan, 728 F.2d 1307, 1313 (10th Cir. 1984) (plaintiffs' failure to seek tribal remedies because of their belief that none existed is not equivalent of pursuing the remedy; speculative futility does not justify federal jurisdiction); Galella v. Onassis, 487 F.2d 986, 997 (2nd Cir. 1973) (failure to comply with disqualification procedures of 28 U.S.C. §144 because of expectation of denial, however well-

founded, cannot be substituted for compliance). Appellants cannot avoid the plain import of the Supreme Court's decision in National Farmers in this manner.

Finally, appellants argue that exhaustion was not required under National Farmers because the tribal court action was motivated by a desire to harass. This exception to the exhaustion requirement, however, may not be utilized unless it is alleged and proved that enforcement of the state scheme was the product of bad faith conduct or was perpetuated with a motive to harass. See National Farmers, 105 S. Ct. at 2454 n.21 (citing Juidice v. Vail, 430 U.S. 327, 337 (1977)). No such proof appears in the record.

This case does not fall within any of the exceptions to the exhaustion requirement. Because the district court has already determined that dismissal rather than abeyance of the federal case is appropriate, we need not remand the case to the district court. Summary judgment in favor of the Tribe was properly granted.

IV. APPELLANTS' CROSS-MOTION FOR SUMMARY JUDGMENT[1]

Appellants also contend that they were

entitled to summary judgment on res judicata or collateral estoppel grounds: they argue that Judge Walsh's decision in United States v. Adams that the tribal court lacked jurisdiction to enter the default judgment in the Tribe's civil suit against Kayle Adams precludes relitigation of that question. We disagree.

The doctrines of res judicata and collateral estoppel operate to preclude relitigation of claims or issues in a subsequent action between the same parties or those in privity with them. 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶ 0.405[1], at 178 (2d ed. 1984). While collateral estoppel may in some cases be available to estop a party to a prior proceeeding from denying what was there judicially determined, such a judgment cannot be pleaded offensively against a non-party to the prior action by one who was a party. See id. ¶ 0.411[1], at 387.

In the instant case, the Tribe was not a party to the criminal action against Adams. We have held that a person technically not a party to the prior action may be bound by the prior decision only "if his interests are so similar to a party's that the party was his 'virtual repre-

sentative' in the prior action. United States v. Geophysical Corp., 732 F.2d at 697 (quoting United States v. ITT Rayonier, Inc., 627 F.2d 996, 1003 (9th Cir. 1980)). Appellants have produced no evidence to show that the United States was the "virtual representative" of the Tribe in the criminal action, or indeed, that the Tribe has the right to participate in or control Adams' criminal prosecution. See American Safety Flight Systems, Inc. v. Garrett Corp., 528 F.2d 288, 289 (9th Cir. 1975) (non-party cannot be estopped to relitigate issues involved in an earlier suit unless he had "the right to participate and control such prosecution or defense").

Appellants' contention that the law of the case doctrine bars relitigation of the question of the tribal court's jurisdiction is equally meritless. Under the law of the case doctrine, a court is precluded from re-examining an issue previously decided by the same court, or a higher appellate court, in the same case. United States v. Maybusher, 735 F.2d 366, 370 (9th Cir. 1984), cert. denied, 105 S. Ct. 790 (1985). In the instant matter, the doctrine is inapposite; appellants seek to apply Judge Walsh's decision made in a different case.

The district court properly denied appellants' cross-motion for summary judgment.

V. CONCLUSION

The existence and extent of a tribal court's jurisdiction in a civil action involving an Indian and a non-Indian requires an examination which should be conducted in the first instance by the tribal court itself. Appellants' failure to exhaust their remedies in tribal court is not excused under any of the exceptions outlined by the Supreme Court in National Farmers. Because the Tribe was not a party to the criminal action against Adams and appellants have not demonstrated the United States was the "virtual representative" of the Tribe in that action, principles of res judicata and collateral estoppel do not operate to preclude relitigation by the Tribe in tribal court of the question whether the tribal court had jurisdiction to enter a default judgment against appellants.

The judgment is AFFIRMED.

FOOTNOTE

[1] Although the existence of a cross-motion for summary judgment would ordinarily imply agreement between the parties that there are no disputed issues of fact, in the instant case the cross-motion is actually an alternative argument. Appellants' position is that (1) they are entitled to summary judgment on res judicata/ collateral estoppel grounds; or (2) if res judicata is not applicable, they have raised issues of material fact which make summary judgment inappropriate.

APPENDIX "2" (a)

42 USC §1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

Historical Note

APPENDIX "2" (b)

28 USC §1331

pgs. 41-42

APPENDIX "2"

28 USC §1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any action brought against the United States, any agency thereof, or any officer or employee thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs on the plain-

tiff.

(June 25, 1948, c.646, §1, 62 Stat. 930; July 25, 1958, P. O. 85-554, §1, 72 Stat. 415; Oct. 21, 1976, P. L. 94-574, §2, 90 Stat. 2721)

APPENDIX "2" (c)

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

CONSTITUTION

of the

UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX "2" (d)

WHITE MOUNTAIN APACHE TRIBAL CODE,
SECTIONS 21.1, 14.7, 14.6

pgs. 44-46

APPENDIX "2"

Section 21.1 Jurisdiction

The Tribal Court of the White Mountain Apache Tribe shall have jurisdiction over all civil suits wherein an Indian or a member of t' White Mountain Apache Tribe is a party. In cases of divorce, the Tribal Court shall have jurisdiction where either the plaintiff or defendant is an Indian who is a bonafide resident of the Fort Apache Indian Reservation.

Section 14.6 Qualifications

Any person over the age of 21 years shall be eligible to serve as a judge of the White Mountain Apache Tribe if he:

1. is a member of the White Mountain Apache Tribe;
2. has never been convicted in any court of a felony; and
3. has not been convicted of a misdemeanor in any court within one (1) year prior to his election, with the exception of minor traffic offenses.

Section 14.7 Disqualification of Judge to Preside Over a Case

A. No judge shall hear or determine any case in which he has a direct interest or wherein a party or counsel for a party is one of the following relatives:

1. uncle or aunt;
2. niece or nephew;
3. grandparent or grandchild;
4. brother or sister;
5. mother or father; or
6. a spouse of one of the preceding.

B. The disqualifications in subsection A of this section shall apply whether or not the relationships are based on the whole or half blood, adoption or remarriage.

C. Any party to a proceeding may raise the issue of the qualification of the judge to hear the case.

Supreme Court, U.S.
FILED
APR 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1598

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1985

A & A CONCRETE, INC., an Arizona corporation, and KAYLE ADAMS and SANDY ADAMS, his wife,

Petitioners,

vs.

THE WHITE MOUNTAIN APACHE TRIBE, dba WHITE MOUNTAIN APACHE DEVELOPMENT ENTERPRISE,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robert Alan Hershey
325 West Franklin Street
Tucson, Arizona 85701
(602) 622-3244

Robert C. Brauchli
Tribal Attorney
White Mountain Apache Tribe
Post Office Box 700
Whiteriver, Arizona 85941
(602) 338-4129

Attorneys for Respondents

80 pp

QUESTION PRESENTED

WHERE AN ASSERTION OF TRIBAL JURISDICTION IS NOT MOTIVATED BY A BAD FAITH DESIRE TO HARASS OR IS NOT PATENTLY VIOLATIVE OF EXPRESS JURISDICTIONAL PROHIBITIONS, AND WHERE AN ADEQUATE OPPORTUNITY EXISTS IN THE INDIAN FORUM TO CHALLENGE THE REACH OF TRIBAL POWERS, CAN A NON-INDIAN, NON-RESERVATION RESIDENT CONTEST IN FEDERAL DISTRICT COURT, PURSUANT TO 28 U.S.C. §1331 AND NATIONAL FARMERS UNION INSURANCE CO. v. CROW TRIBE, 105 S.Ct. 2447 (1985), A TRIBE'S EXERCISE OF ITS JURISDICTION WITHOUT FIRST EXHAUSTING REMEDIES PROVIDED BY THE INDIAN NATION?

PARTIES TO THE PROCEEDING

1. Petitioners

A & A CONCRETE, INC., an Arizona corporation

KAYLE ADAMS and SANDY ADAMS, his wife

2. Respondents

THE WHITE MOUNTAIN APACHE TRIBE

WHITE MOUNTAIN APACHE DEVELOPMENT ENTERPRISE

CHARLES A. PATTERSON

VIOLET PATTERSON

SHIRLEY PATTERSON

NEIL HALL

JANE DOE HALL

RONNIE LUPE

JANE DOE LUPE

TABLE OF CONTENTS

Question Presented	i
Parties to the Proceeding	ii
Table of Authorities	v
Opinion Below	1
Grounds for Jurisdiction	2
Constitutional Provisions, Statutes, Ordinances and Regulations	1
Statement of the Case	2
Summary of Argument	4
ARGUMENT	
I. PETITIONERS HAVE MISSTATED THE POSTURE OF THIS CASE	6
II. PETITIONERS WERE REQUIRED TO EXHAUST TRIBAL REMEDIES BEFORE SEEKING FEDERAL REVIEW	11
III. PETITIONERS WERE GIVEN EFFECTIVE NOTICE OF THE TRIBAL COURT LAWSUIT AND AN OPPORTUNITY TO BE HEARD	22
IV. PETITIONERS' PRAYER FOR REMAND WOULD ONLY RESULT IN SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS	31

TABLE OF CONTENTS (Continued)

Conclusion 33

Appendix Blue

TABLE OF AUTHORITIES

Cases:	Page
A & A Concrete, Inc. v. White Mountain Apache Tribe, 676 F.2d 1330 (9th Cir. 1982)	2, 12
A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir. 1986)	3, 11
Adickes v. S.H. Kress Co., 338 U.S. 144 (1970)	10
American Indian Agricultural Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985)	20
Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983) cert. denied 104 S.Ct. 1707 (1984)	13, 20
Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961)	27
Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.) cert. denied 103 S.Ct. 293 (1982)	13, 20
Francisco v. State, 113 Ariz. 427, 556 P.2d 1 (1976)	23
Goss v. Lopez, 419 U.S. 565 (1975)	27

Grigsby v. CMI Corp.,
765 F.2d 1369
(9th Cir. 1985) 18

Hannah v. Larche,
363 U.S. 420 (1960) 6

Hardin v. White Mountain
Apache Tribe,
761 F.2d 1285
(9th Cir. 1985) 14

In Re Murchison,
349 U.S. 133 (1955) 25

Johnson v. Chilkat Indian
Village, 457 F.Supp 384
(D. Alaska 1978) 29

Knight v. Shoshone and
Arapahoe Indian Tribes,
670 F.2d 900
(10th Cir. 1982) 20

Merrion v. Jicarilla
Apache Tribe,
455 U.S. 130 (1982) 13,19
20

Montoya v. United States,
180 U.S. 261 ((1901) 16

Morgan v. Colorado River
Indian Tribe,
103 Ariz. 425, 433
P.2d 421 (1968) 20

Morrissey v. Brewer,
408 U.S. 480 (1972) 27

Mullane v. Central Hanover
Bank & Trust Co.
339 U.S. 306 (1950) 27

Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977)	10
National Farmers Union Insurance Co. v. Crow Tribe of Indians, 471 U.S. ___, 105 S.Ct. 2447 (1985)	4, 11, 14, 18, 20, 31
N.L.R.B. v. Ohio New and Rebuilt Parts, Inc., 760 F.2d 1443 (6th Cir. 1985)	28
Northwest South Dakota Production Credit Association v. Smith, ___ F.2d ___ (No. 8460), 8th Cir. 2/19/86	20
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	32
R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, (9th Cir. 1983)	12, 14, 17, 20, 24
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	7, 12, 13, 19
Shoshone and Arapahoe Tribes v. Knight, 7 ILR 3116 (D. Wyo 1980) affirmed Knight v. Shoshone and Arapahoe Tribes, 670 F.2d 900 (10th Cir. 1982)	26

Stands Over Bull v. Bureau of Indian Affairs, 442 F.Supp. 360 (D. Montana 1977) 27

S. Unique v. Gila River Pima-Maricopa Indian Community, 674 P.2d 1376 (Ariz.App. 1983) 20

Torres v. First State Bank of Sierra County, 588 F.2d 1322 (10th Cir. 1978) 12

United States v. Mazurie, 419 U.S. 544 (1975) 19

United States v. Montana, 450 U.S. 564 (1981) 13, 19

White Mountain Apache Tribe v. Shelley, 107 Ariz. 1, 480 P.2d 654 (1971) 20

Williams v. Lee, 358 U.S. 217 (1959) 7, 13, 19

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) 15

World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286 (1980) 23, 24

Constitutions, Statutes and Rules:

Fifth Amendment to the United States Constitution 25

25 U.S.C. §476 et seq. 17, 18

25 U.S.C. §1301 et seq. 8

28 U.S.C. §1331 11, 31

42 U.S.C. §1983 11, 12, 31

White Mountain Apache Tribal Code:

§11.1(4) and (6) 16

§13.1 29

§13.5 29

§14.7 7, 28

§21.1 14, 15, 19

§21.2(A) 15

§21.2 14, 15, 19, 22

§21.4 7, 14, 19, 29

Ordinance Number 118 15

Federal Rules of Civil Procedure:

Rule 52 10

Rule 59 11

Other Authorities:

F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 360 (1982) 23

OPINION BELOW

A & A CONCRETE, INC. v. THE WHITE MOUNTAIN APACHE TRIBE, et al., 781 F.2d 1411 (9th Cir. 1986)

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is more correctly invoked by Petitioners pursuant to 28 U.S.C. §1254

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS

Fifth Amendment to the United States Constitution

28 U.S.C. §1331

42 U.S.C. §1983

White Mountain Apache Tribal Code Sections 11.1(4) and (6), 13.1, 13.5, 14.7, 21.1, 21.1(A), 21.2, 21.4

STATEMENT OF THE CASE

In the fall of 1979, Petitioners, without first making any attempt to exhaust their tribal remedies, brought suit against the White Mountain Apache Tribe and various other named Respondents in United States District Court for the District of Arizona. The Amended Complaint alleged a deprivation of civil rights, a conspiracy to deprive Petitioners of their civil rights, and related pendent state tort and contract claims. The District Court dismissed the case for want of jurisdiction on February 29, 1980. On appeal the Ninth Circuit Court of Appeals affirmed the dismissal with respect to Count 2 of the Amended Complaint yet reversed and remanded the cause of action with respect to the remaining claims. A & A Concrete, Inc. v. White Mountain Apache Tribe, 676 F.2d 133 (9th Cir. 1982)

(A & A Concrete I). On May 13, 1985 the District Court granted Respondents' Motion for Summary Judgment and denied Petitioners' Cross-Motion for Summary Judgment. The decision of District Judge Craig was affirmed by the Ninth Circuit on February 6, 1986. A & A Concrete, Inc. v. White Mountain Apache Tribe, et al., 731 F.2d 1411 (9th Cir. 1986)(A & A Concrete II).[1]

---

[1] The opinions of the Ninth Circuit Court of Appeals in both A & A Concrete I and II, in Lodging with the Court.

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit Court of Appeals correctly interpreted the pronouncements of this Court in National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. ___, 105 S.Ct. 2447 (1985). Because Petitioners failed to exhaust the remedies which existed in the White Mountain Apache forum, their complaint lodged in the federal district court was premature and non-cognizable.

A & A Concrete, Inc. chose upon advice of counsel to ignore a tribal court Summons and Complaint and consequently suffered a default judgment. The Apache Tribal Code provided for personal and subject matter jurisdiction over the parties and the controversy between them. Furthermore, the Tribe had the inherent sovereign power to regulate the consensual commercial conduct between itself and

Petitioners. United States v. Montana, 450 U.S. 564 (1981).

By failing to enter the Apache forum, Petitioners obstructed their own tribal remedies. And even though they neglected to exhaust, Adams did indeed litigate the civil rights claims in the federal district court. Petitioners' lack of any probative evidence, however, could not withstand Respondents' Motion for Summary Judgment.

ARGUMENT I

PETITIONERS HAVE MISSTATED THE POSTURE OF THIS CASE

In 1979, the White Mountain Apache Development Enterprise, an economic subsidiary of the White Mountain Apache tribal government, was forced to dismantle twelve houses because of defective foundations, the concrete for which was supplied by Petitioners Kayle and Sandy Adams dba A & A Concrete, Inc. and Apache Redi-Mix. The Development Enterprise (hereafter also referred to as Tribe or Respondent) brought suit for breach of contract in the White Mountain Apache Tribal Court against these suppliers of the deficient concrete (hereafter also referred to as Adams or Petitioners).

Adams was served with a Summons and Complaint, was formally given twenty days to answer the process and informally

allowed several additional months by the Tribe's special counsel to come forward and be heard prior to default. Contrary to clear legal authority, see, Williams v. Lee, 358 U.S. 217 (1959) and Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), Petitioners' counsel advised them not to respond to the Tribe's Complaint and not even to enter a special appearance to contest the jurisdiction of the tribal court. Because no answer was filed, the capacity of the Tribe to bring the lawsuit as a proper party plaintiff was not raised by way of negative averment. Furthermore, though the issue could have been presented there, the qualifications of the tribal court judge were never challenged in the Apache forum.[2] As a result of Adams' failures to respond a default judgment was

---

[2] See Sections 21.4 and 14.7 of the Tribal Code, reproduced in Respondents' Appendix at pages 10-11 and 6, respectively.

entered against Petitioners in February, 1980. No objection was made to a subsequent Writ of Execution issuing out of the tribal court.

Petitioners sought no other relief from the Secretary of the Interior or the White Mountain Apache Tribal Council, nor pursued a path through the Indian Civil Rights Act, 25 U.S.C. §1301 et seq. Instead, in an apparent attempt to distract attention from their previously ill-advised legal decision, Adams launched a groundless and vexatious attack on the White Mountain Apache Tribe, directly contesting the sovereign powers of the Apache Nation to govern commercial activities within its borders. Petitioners herein have consistently failed to provide either legal or factual support for their broad and conclusory allegations, choosing rather to press forward with contemptuous and cavalier attitudes.

For example, in their Petition for Writ of Certiorari, Adams contrives and misrepresents that because of a tribal court writ of garnishment served on a non-Indian contractor who was building a high school on the reservation, Petitioners were deprived of a contractual right to $300,000.00 in profits. In truth, and in support of Respondents' Motion for Summary Judgment in the District Court, the attorney for the contractor stated in his sworn affidavit that Adams lost the concrete pouring contract with his corporation because of a price dispute and not due to any impropriety on the part of the Tribe. (Excerpt of the Ninth Circuit Record Vol. 4, Pages 716-717, hereafter referred to as ER ___/___.) Adams presented no evidence beyond their counsel's bare assertion that anything else was involved. Indeed, upon Defendants/ Respondents' Motion for Summary Judgment,

Petitioners offered no countervailing affidavits or substantive proof that contractual interference or a conspiracy to deny civil rights ever existed. Such action by Petitioners is nothing short of perilous. See Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620, 625 (9th Cir. 1977), quoting Adickes v. S.H. Kress & Co., 398 U.S.144 (1970). Yet, in pleading after pleading, Adams has continued to allege the same falsehoods.

During the pendency of the federal district court proceedings, Petitioners continued to avoid the tribal court and made no attempt in either the lower court or the Ninth Circuit Court of Appeals to stay the effect of the tribal judgment. No motion to amend or make additional findings pursuant to Rule 52 of the Federal Rules of Civil Procedure was filed by Adams nor was a request lodged to alter or amend the Summary Judgment in accord-

ance with Rule 59 of the Federal Rules of Civil Procedure.

ARGUMENT II

PETITIONERS WERE REQUIRED TO EXHAUST TRIBAL REMEDIES BEFORE SEEKING FEDERAL REVIEW

Petitioners here have confused the decision of the Ninth Circuit Court of Appeals. A & A Concrete, Inc. v. White Mountain Apache Tribe, et al., 781 F.2d 1411 (9th Cir. 1986). That Court did not, as Adams implies, rule that exhaustion of tribal court remedies was a prerequisite to a valid claim under 42 U.S.C. §1983. Indeed, the Circuit judges concluded that it was unnecessary to reach the question of whether Adams established the existence of state action on their §1983 claim because exhaustion was required as a condition of district court review under federal question jurisdiction, 28 U.S.C. §1331. See National Farmers Union Insurance Company v. Crow Tribe, 471 U.S. ___,

105 S.Ct. 2447 (1985).

Had the Ninth Circuit chosen to extend its holding and deny Petitioners any reliance upon 42 U.S.C. §1983, it would have been proper, however, for another reason. No action under 42 U.S.C. §1983 can be maintained in federal court in favor of individuals who charge a deprivation of constitutional rights under color of tribal law. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983). The mere fact that state officers assisted the tribal court process server in the delivery of his papers does not amount to "state action" under color of law and, therefore, such conduct without more is not proscribed by 42 U.S.C. §1983. A. & A. Concrete, Inc. v. White Mountain Apache Tribe, et al., 676 F.2d 1330 (1982); Torres v. First State Bank of

Sierra County, 588 F.2d 1322 (10th Cir. 1978). No Agreement between the state actors and tribal officials to injure Adams' business has been established.

In discussing whether or not the White Mountain Apache Tribe properly exercised its jurisdiction to bring Adams before the tribal court, it is shocking that Petitioners have omitted from their Petition for Writ of Certiorari any reference or analysis of at least eight major cases applicable to the issues before this Court, including:

Williams v. Lee, 358 U.S. 217 (1959);

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978);

United States v. Montana; 450 U.S. 564 (1981);

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982);

Cardin v. De la Cruz, 671 F.2d 363 (9th Cir. 1982);

Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983);

R.J. Williams Co. v. Fort Belknap Housing Authority, 710 F.2d 979 (9th Cir. 1983); and

Hardin v. White Mountain Apache Tribe, 761 F.2d 1285 (9th Cir. 1985).

Petitioners contend that footnote 21 in National Farmers, supra at 2454, excuses them from any discussion of the inherent sovereign powers of an Indian tribe to regulate commercial interests within the reservation boundaries when the economic viability, safety or health of tribal members is at stake.[3]

Their excuse, however, rests upon a misunderstanding of the Tribe's standing to sue as an "Indian" pursuant to Section 21.1 of the Tribal Code.[4] The White

---

[3] Footnote 21 states:
"We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."

[4] Sections 21.1, 21.2 and 21.4 are reproduced in Respondents' Appendix at pages 7-11.

Mountain Apache tribal body of law and government provides for the adjudication of business controversies between all persons, both members and non-members. Section 21.2(A). Congress has never removed this power and, therefore, the tribe has retained the right to govern matters such as the Adams dispute. It exercised this ability by suing in tribal court directly as an Indian party. At the time the tribal court lawsuit was commenced, Section 21.1 of the Tribal Code stated:

> The Tribal Court of the White Mountain Apache Tribe shall have jurisdiction over all civil suits wherein an Indian or a member of the White Mountain Apache Tribe is a party . . .[5]

---

[5] By resolution in 1981, the Tribal Council amended Sections 11.1(4) and (6), 21.1 and 21.2 of the Tribal Code. ER 4/778-785. Ordinance 118 is reproduced in Respondents' Appendix at pages 12-28. The clear original legislative intent in the 1974 Ordinance [96] was to import singular and several meanings to the word "Indian." See Wilson v. Omaha, 442 U.S. 653 (1979).

Two other sections in the Code supplied definitions for the terms included therein:

> 11.1(4) 'Indian' shall mean any person of Indian descent who is a member of any recognized Indian tribe under federal jurisdiction.
>
> 11.1(6) 'Person' shall mean a natural person, Indian or non-Indian, and where relevant, a corporation or unincorporated association.

Despite such non-limiting language, Petitioners have argued that the word "Indian" does not equate with the word "tribe." In order to constitute a tribe, a group of Indians must be of a same or similar race, living in the same community with one body of leadership which is federally countenanced. Montoya v. States, 180 U.S. 261, 266 (1901). In essence, a tribe of Native Americans may not exist without being comprised of Indians. The term "tribe," then, merely clarifies the meaning of "Indian" by limiting which Indian communities qualify

as Federally recognized and those that do not. "The term 'tribe' . . . shall be construed to refer to any Indian tribe, organized band, Pueblo, or the Indians residing on one reservation," (emphasis added) 25 U.S.C. §479. Accord, Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979).

The tribal legislators never intended to forfeit their powers of self-government and regulation over business transactions on the reservation by simply omitting the term "tribe" from the definitions of "person" or "Indian" in the Code. Absent a showing that the statutory context expressly excluded "tribe" from the definition of "Indian," no interpretation other than inclusion is reasonable. Petitioners made no attempt to obtain a ruling from the tribal court concerning the Tribe's capacity to bring suit. They were required to do so in the first instance. R.J. Williams, supra at 983.

The district court should not denigrate sovereignty and become an arbiter of tribal legislative intention when, as here, the tribal court has not had a chance to rule on its own jurisdiction.[6]

Congress exercised its constitutional authority when it expressly recognized the Indian's right to self-determination. Indian Reorganization Act of 1934, 25 U.S.C. §476 et seq.[7] In accordance with legislative intent, and bolstered by the overwhelming support given the Indians by the courts of this land, the White Moun-

---

[6] An extensive record was presented to the district court and reviewed de novo by the Ninth Circuit. Grigsby v. CMI Corp. 765 F.2d 1369 (9th Cir. 1985). The Court of Appeals found no proof that the tribal court action was motivated by a desire to harass or that there was lacking an adequate opportunity to challenge the tribal court's jurisdiction. Therefore, Petitioners were not excused, under National Farmers, from exhausting their tribal remedies.

[7] Section 16 of the Indian Reorganization Act, reproduced in Respondents' Appendix at pages 30-32.

tain Apache Tribe organized under Section 16 of that Act and adpoted a system of self-government. Part of its authority is reflected in Sections 21.1, 21.2 and 21.4 of the Tribal Code. This codification provides for the existence of subject matter jurisdiction in the tribal court over disputes involving consensual business conduct between the tribe and non-Indians. Such is a matter which affects the health and welfare of the reservation.

Both prior to and subsequent to the tribal court lawsuit against Adams, the appropriateness of adjudicating controversies between Indians and non-Indians in tribal forums was well recognized. Williams v. Lee, 358 U.S. 217 (1959); United States v. Mazurie, 419 U.S. 544 (1975); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. Montana, 450 U.S. 564 (1981); Merrion v.

Jicarilla Apache Tribe, 455 U.S. 130 (1982); National Farmers, supra; Knight v. Shoshone Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982); Cardin v. De la Cruz, 671 F.2d 363 (9th Cir.), cert. denied, 103 S.Ct. 293 (1982); Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983); R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983), cert. denied, 105 S.Ct. 3476 (1985); White Mountain Apache Tribe v. Shelley, 107 Ariz. 4, 489 P.2d 654 (1971); Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 433 P.2d 421 (1968); S. Unique v. Gila River Pima-Maricopa Indian Community, 138 Ariz. 370, 674 P.2d 1376 (App. 1983). See also Northwest Dakota Production Credit Association v. Smith, ___ F.2d ___ (No. 84-2460, 8th Cir. 2/19/86); American Indian Agricultural Consortium v. Standing Rock Sioux Tribe,

780 F.2d 1374 (8th Cir. 1985).

The nature of the non-Indian activity involved here was part of a tribal plan to protect and enhance the tribal members and reservation resources. Adams entered into a voluntary and consensual contract with the Tribe dba Development Enterprise. The terms were negotiated and consummated within the exterior boundaries of the Fort Apache Indian Reservation. The place of performance was within the geographical borders of the Tribe. Partial performance, payment, the delivery of defective concrete, and the breach all occurred on tribal lands.

ARGUMENT III

PETITIONERS WERE GIVEN EFFECTIVE NOTICE OF THE TRIBAL COURT LAWSUIT AND AN OPPORTUNITY TO BE HEARD.

Service of process outside the reservation is provided for in Section 21.2B of the Tribal Code:

> Service of process upon any person who is subject to the jurisdiction of the Courts of the White Mountain Apache Tribe, as provided in this section, may be made by personally serving the summons upon the defendant outside this reservation with the same force and effect as though summons had been personally served within the reservation.

Of major significance is that Petitioners, in accordance with this provision, were handed a Summons and Complaint, and garnishment documents, actual notice that a lawsuit as well as prejudgment jeopardy had been commenced against

their interests.[8] By Adams' own admission, they chose to ignore the opportunity to contest the action in tribal court.[9]

"As long been settled, . . . a state court may exercise personal jurisdiction over a non-resident defendant only so long as there exists 'minimum contacts' between the defendant and the forum state." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980). There is no reason to change the rules of construction

---

[8] A White Mountain official can effectuate valid service of process outside the reservation with the assistance of officers vested with the power to serve summons and complaints within their respective jurisdiction. Cf. Francisco v. State, 113 Ariz. 427, 556 P.2d 1, 2 n.1 (1976), cited with approval in F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 360 (1982).

[9] It is of some importance that Petitioners have not claimed that the actual notice they received was facially inadequate. Presumably, they question here only their subjection to the Tribe's "long-arm" jurisdiction.

concerning "minimum contacts" where a sovereign other than a state is involved. An Indian tribe can only expect to assert fairly its judicial range toward those effectuating some interaction with it.

Respondents have proven that Adams most definitely had substantial contacts with the White Mountain Apache forum. The common sense of the Supreme Court, again in World-Wide, supra, at 297, completely supports this position:

> When a corporation 'purposefully' avails itself of the privilege of conducting activities within the forum' . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the state.

Accord, Northern Propane Gas Co. v. Kipps, 127 Ariz. 522, 622 P.2d 469 (1981). See also R.J. Williams v. Fort Belknap Housing Authority, supra.

Nevertheless, Petitioners argue that

submission of non-Indian, off-reservation individuals to the jurisdiction of the tribal court is a denial of due process under the Fifth Amendment to the Constitution and the right of equal protection of the laws as guaranteed to all citizens of the United States. In Re Murchison, 349 U.S. 133 (1955), their support for such a proposition, can in no manner be construed in parity with the facts of our present case. Murchison was called before a "one-man judge-grand jury," interrogated at length in the Judge's secret hearings, then charged with perjury and ordered to appear and show cause why he should not be punished for criminal contempt. The judge who had been the "grand jury" then tried Murchison in open court, convicted and sentenced him for contempt.

Justice Black observed that the judge would presumably have been a material witness for the defendant, yet

as trier would necessarily deprive Murchison of the right of examining or cross-examining him. "[T]here would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining guilt or innocense... [T]he state would have the benefit of the judge's personal knowledge while the accused would be denied [effective cross-examination]." Id. at 139. Petitioners here have not claimed that their right of cross-examination was abridged.

Respondents commend this Court to observe the district court opinion in Shoshone and Arapahoe Indian Tribes of the Wind River Reservation v. Knight, et al., 7 I.L.R. 3116, 3120 (D. Wyo. 1980), aff'd, Knight v. Shoshone and Arapahoe, supra:

> [T]he exact parameters of due process vary according to the specific factual contexts in which it appears. Hannah v. Larche, 363 U.S. 420, 4 L.Ed.2d 1307, 80 S.Ct. 1502 (1960). The essential elements of due process are that a party whose rights are to be affec-

> ted, is entitled to notice and the opportunities to be heard. Goss v. Lopez, 419 U.S. 565, 42 L.Ed.2d 725 95 S.Ct. 729 (1975). Like with other due process concepts, the type of notice that is required varies with the circumstances and conditions . . . but it must be notice that a party would reasonably adopt if the party was desirous of informing the person to be notified. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950).
>
> Persons contracting . . . within the limits of the authority of a governing body are charged with knowledge of the regulations governing the subject matter. (Emphasis supplied.)[10]

Petitioners further contend that it is a denial of due process for a tribal judge to preside over a claim by the Tribe itself against a non-Indian involving a large sum of money. The Tribal Code specifies, however, that any party may raise the issue of the qualification of a judge

---

[10] See also Morrissey v. Brewer, 408 U.S. 480, 481 (1972); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Stands Over Bull v. Bureau of Indian Affairs, 442 F.Supp. 360 (D. Montana 1977).

to hear the case. Section 14.7. [11] Must federal district court judges be disqualified merely because the United States is a party? In an Indian claims case against the United States, should the judge not be a citizen of the United States? There is a strong and firm presumption that government officials perform their functions without bias. N.L.R.B. v. Ohio New and Rebuilt Parts, Inc., 760 F.2d 1443 (6th Cir. 1985). Moreover, tribal judges are subject to removal only for specifically enumerated causes.

Adams has completely misread Section 14.7 of the Tribal Code. That provision does indeed provide a basis for disqualifying a judge that has a "direct interest" in a case. Furthermore, Petitioners could have fashioned an appropriate pleading to

---

11 Section 14.7 has been reproduced in Respondents' Appendix at page 6.

be used to contest the bias of the judge or to even have called for removal. See Section 21.4 of the Tribal Code.

Sections 13.1 through 13.5 of the Tribal Code recite the jurisdiction, composition, and ancillary matters of the tribal Court of Appeals.[12] Because the Secretary of the Interior has ratified the provisions contained therein, the form of the appellate court conforms with the requisites of Johnson v. Chilkat Indian Village, 457 F.Supp. 384 (D. Alaska 1978).

Kayle Adams, Sandy Adams, A. & A. Concrete, Inc. and Apache Redi-Mix, had no contractual right to be the exclusive concrete supplier for the tribal housing program. The Development Enterprise and its superintendent, Charles Patterson, could have fired Adams on the spot at any

---

[12] Sections 13.1 through 13.5 have been reproduced in Respondents' Appendix at pages 3-5.

time. Yet, Petitioners have put before this Court and the lower courts as well that, instead of simply discontinuing business relations, the Tribe and several Respondents concocted an elaborate scheme to deny Adams their constitutional rights.[13] This position is a camouflage for poor legal advice. It was incumbent upon Petitioners to respond to the Summons in tribal court in whatever manner of challenge was necessary. By their own choosing, they denied themselves due process and the opportunity to be heard which was afforded by the Tribe.

---

[13] At the hearing on the Motions for Summary Judgment, Petitioners offered no additional testimony or probative evidence regarding the conduct of the named Respondents.

ARGUMENT IV

PETITIONERS' PRAYER FOR REMAND WOULD ONLY RESULT IN SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS

Even before this Court's decision in National Farmers, supra, Respondents undertook the same careful examination required by that opinion and presented it to the district court. Petitioners had the opportunity and did in essence litigate their claims fully under both 42 U.S.C. §1983 and 28 U.S.C. §1331. Judge Craig nevertheless ruled that there was no question of law or fact on any grounds advanced which would entitle Adams to relief. Petitioners now have requested that this Court order the district court action to be held in abeyance until they have exhausted their tribal remedies. Assuming Adams is allowed to return to the tribal court and exhaust as a pre-

requisite to further federal court intervention, there is nothing else Petitioners could present upon return to the federal district court which would prevent the granting of summary judgment once again.

Their case is going to be the same regardless of the clamor that is made. Some finality to this burdensome litigation is necessary. Petitioners have arrogated for nearly seven years that the White Mountain Apache Tribal Court system is a futile chamber, yet they really cannot present to this Court any record, except abstract speculation, that the Tribe conducted itself unfairly. Petitioners all along hoped that Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) would be applied across the board in a civil context. It was this unshakeable belief and the fear of malpractice that has kept the embers of this case from dying out.

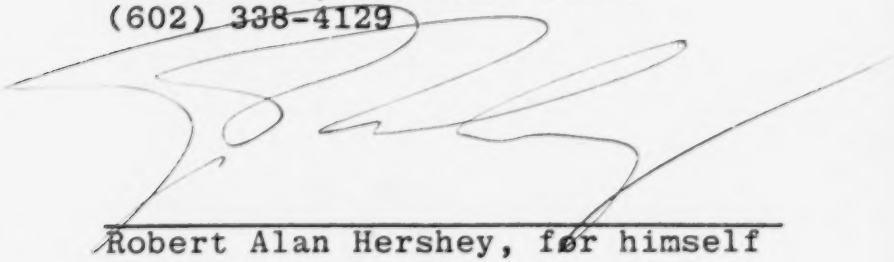
CONCLUSION

For the foregoing reasons the Petition for Certiorari should not be granted.

RESPECTFULLY SUBMITTED,

ROBERT ALAN HERSHEY
Attorney at Law
325 West Franklin Street
Tucson, Arizona 85701
(602) 622-3244

ROBERT C. BRAUCHLI
Tribal Attorney
The White Mountain Apache Tribe
Post Office Box 700
Whiteriver, Arizona 85941
(602) 338-4129



Robert Alan Hershey, for himself
and
Robert C. Brauchli
Attorneys for Respondents

APPENDIX

Sections of the White Mountain Apache Tribal Code:

11.1 (4) and (6)	Pages 1-2
13.1 through 13.5	Pages 3-5
14.7	Page 6
21.1 through 21.2	Pages 7-10
21.4	Pages 10-11
Ordinance No. 118	Pages 12-28
Fifth Amendment to the United States Constitution	Page 29
25 U.S.C. §476	Pages 30-32
28 U.S.C. §1331	Pages 33-34
42 U.S.C. §1983	Page 35

SECTION 11
CHAPTER I, PART I - DEFINITIONS
THE WHITE MOUNTAIN APACHE TRIBAL CODE

Section 11.1 Defintions

In this code, unless the context otherwise requires:

1. "Aault" shall mean a person who is 18 years of age or older.

2. "Code," "law and order code," or "tribal code" shall mean the Law and Order Code of the White Mountain Apache Tribe, as adopted by the Tribal Council.

3. "Council" or "Tribal Council" shall mean the White Mountain Apache Tribal Council duly assembled.

4. "Indian shall mean any person of Indian descent who is a member of any recognized Indian tribe under federal jurisdiction.

5. "Non-Indian" shall mean a person who is not an Indian.

6. "Person shall mean a natural person, Indian or non-Indian, and where relevent, a corporation or unincorporated association.

7. "Property" shall mean both real and personal property.

8. "Reservation" shall mean the area within the exterior boundaries of the Fort Apache Indian Reservation.

9. "Tribal judge" shall mean the Chief Judge of the Tribal Court of the White Mountain Apache Tribe or an Associate Judge.

10. "Visiting judge" shall mean a judge of another Indian tribe, a former judge of the White Mountain Apache Tribe, a state court judge, or a justice of the peace who has been designated by the Chief Judge of the Tribal Court to hear and determine a case.

SECTION 13
CHAPTER I, PART III
THE COURT OF APPEALS
THE WHITE MOUNTAIN APACHE TRIBAL CODE

Section 13.1 Jurisdiction

The Court of Appeals of the White Mountain Apache Tribe shall have jurisdiction to hear appeals by an aggrieved party from final orders or final judgments of the Trial Court and of other inferior courts as have been established by the Tribal Council.

Section 13.2 Composition

A. The Court of Appeals shall consist of three judges, none of whom shall be the presiding judge of the court which rendered the order of judgment appealed from.

B. Tribal judges not absent, disqualified or disabled will consitute the Court of Appeals. The Chief Judge of

the Tribal Court may designate visiting judges to complete the constitution of the Court of Appeals.

Section 13.3 Presiding Judge

The Chief Judge of the Tribal Court shall desingate one judge to preside over proceedings in the Court of Appeals.

Section 13.4 Compensation for Visiting Judges

Visiting judges designated to serve on the Court of Appeals or any other court shall be paid at a daily rate determined by the Chief Judge of the Tribal Court.

Section 13.5 Sessions

The Court of Appeals shall meet at Whiteriver, Arizona, within twenty regular working days after notice of an appeal or application for other relief has been made to the court through the

Clerk of the Tribal Court, or as soon thereafter as feasible.

Section 14.7 Disqualification of Judge to Preside Over a Case

A. No judge shall hear or determine any case in which he has a direct interest or wherein a party or counsel for a party is one of the following relatives:

1. uncle or aunt;
2. niece of nephew;
3. grandparent or grandchild;
4. brother or sister;
5. mother or father; or
6. a spouse of any of the preceeding.

B. The disqualifications in subsection A of this section shall apply whether or not the relationships are based on the whole or half blood, adoption or remarriage.

C. Any party to a proceeding may raise the issue of the qualifications of the judge to hear the case.

SECTION 21
CHAPTER II, PART I
CIVIL ACTIONS
THE WHITE MOUNTAIN APACHE TRIBAL CODE

Section 21.1 Jurisdiction

The Tribal Court of the White Mountain Apache Tribe shall have jurisdiction over all civil suits wherein an Indian or a member of the White Mountain Apache Tribe is a party. In cases of divorce, the Tribal Court shall have jurisdiction where either the plaintiff or defendant is an Indian who is a bona fide resident of the Fort Apache Indian Reservation.

Section 21.2 Acts Submitting to Jurisdiction; Process

A. Any person, whether or not a member of the White Mountain Apache Tribe or a rsident of the Fort Apache Indian Reservation, who in person or through an agent commits any of the acts hereinafter

enumerated, thereby submits such person, and if an individual his personal representative, to the jurisdiction of the White Mountain Apache Tribe as to any cause of action arising from the doing of any such acts:

1. the transaction of any business within the reservation;

2. the commission of a tortious act within the reservation;

3. the use or possession of any real estate situated within the reservation;

4. contracting to insure any person, property or risk located within the reservation at the time of contracting;

5. contracting with a resident member of the Tribe for the sale or purchase of any goods or merchandise knowing such contract is to be performed on or from within the reservation.

B. Service of process upon any person who is subject to the jurisdiction of the Courts of the White Mountain Apache Tribe, as provided in this section, may be made by personally serving the summons upon the defendant outside this reservation with the same force and effect as though summons had been personally served within the reservation.

C. Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

D. Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by Tribal Ordinance.

E. This section shall not be construed to extend the jurisdiction of the Tribal Court to suits where no party to the case is an Indian or member of the Tribe.

Section 21.4 Law Applicable in Civil Suits

In all civil cases the Tribal Court shall apply any laws of the United States that may be applicable, and authorized regulations of the Interior Department and any ordinances or customs of the tribe, not prohibited by Federal Laws.

Where any doubt arises as to the customs of the tribe, the Court may request the advice of counselors familiar with these customs and usages. Any matters that are not covered by the traditional customs and usages of the tribe or ordinances of the White Mountain

Tribal Council or by applicable Federal laws and regulations, shall be decided by the Tribal Court according to the laws of the State of Arizona.

Resolution No. 81-46

RESOLUTION OF THE
WHITE MOUNTAIN APACHE TRIBE OF THE
FORT APACHE INDIAN RESERVATION

WHEREAS, the Tribal Council of the White is a federally recognized Indian Tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. 476, et seq., and

WHEREAS, the White Mountain Apache Tribal Council pursuant to 25 U.S.C. §476, enacted the White Mountain Apache Amended Constitution and By-Laws which were approved by the United States Secreatary of the Interior on May 29, 1958, and

WHEREAS, once so approved, said Constitution and By-Laws became law, and

WHEREAS, Section 21.1 of the White Mountain Apache Law and Order Code, adopted pursuant to Article V, Section 1, paragraph (g) of the Constitution entitled "jurisdiction" declares, inter alia, that the Tribal Court of the White Mountain Apache Tribe shall have jurisdiction over all civil suits wherein an Indian or a member of the White Mountain Apache Tribe is a party, and

WHEREAS, Section 11.1(4) and (6) of the White Mountain Apache Law and Order Code defines "Indian" and "Person" respectively, to mean and include where relevant, an unincorporated association, such as the White Mountain Apache Tribe, and

WHEREAS, the White Mountain Apache Tribe is an "Indian" and "Person" within the meaning of Section 21.1, 21.2, 11.1 (4)

and (6) of the Law and Order Code of the White Mountain Apache Tribe, and

WHEREAS, the White Mountain Apache Tribe is not an entity separate and apart from its members, nor a corporation pursuant to 25 U.S.C. §476 et seq., but rather is an unincorporated association, and

WHEREAS, the United States Supreme Court in Wilson v. Omaha Indian Tribe, 442 U.S. 653, 612. Ed2d 153,99 S.Ct. 2529 (1979) and other Federal Courts and statutes have held that an Indian Tribe is an Indian and that the term "Indian" importing the singular includes and applies to several persons and parties, and

WHEREAS, the Tribal Council has been advised that the United States District Court for the District of Arizona in

Tucson, Arizona in a criminal proceeding entitled United States of America v. Kayle Adams, CR 80-202-GLO-JAW, has dismissed the indictment against defendant Kayle Adams on the grounds that the White Mountain Apache Tribe was an entity separate and apart from its members, and did not qualify as an Indian within the meaning of Sections 21.1 and 21.2 of the White Mountain Apache Law and Order Code, which confers jurisdiction, and

WHEREAS, the Tribal Council of the White Mountain Apache Tribe has been advised and therefore has reason to believe that on occasion the Federal Courts and State Courts have failed to recognize and are apt to fail to recognize and respect in the future the sovereignty and comity rightfully due the Tribal Court of the White Mountain Apache Tribe and the pro-

visions, Ordinances, and Rules of Procedure of the Law and Order Code of the White Mountain Apache Tribe, and

WHEREAS, the Tribal Council finds it necessary because of this lack of comity and respect for its duly enacted Law and Order Code and the relevant interpretations thereof regarding jurisdiction, to amend the sections pertaining to jurisdiction so as to clarity for non-tribal courts the meaning of the word "Indian" and "Person" as used in Sections 21.1, 21.2, 11.1(4) and (6) of the White Mountain Apache Law and Order Code,

BE IT RESOLVED that the Tribal Council hereby enacts the following amendments by Ordinance No. 118 to the White Mountain Apache Tribal Law and Order Code in the form and text as attached and incor-

porated by reference herein.

The foregoing resolution was on February 17, 1981, duly adopted by a vote of 10 for and zero against by the Tribal Council of the White Mountain Apache Tribe, pursuant to the authority vested in it by Article V, Section 1(i) of the Amended Constitution and By-Laws of the Tribe, ratified by tne Tribe June 27, 1958, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

s: Lynn Cody
Acting Chairman of the Tribal Council

s: Mary C. Endfield
Secretary of the Tribal Council

ORDINANCE NO. 118

ORDINANCE OF THE
WHITE MOUNTAIN APACHE TRIBE OF THE
FORT APACHE INDIAN RESERVATION

BE IT ENACTED by the Tribal Council of the White Mountain Apache Tribe that Sections 11.1 (4) and (60, 21.1 and 21.2 of the White Mountain Apache Law and Order Code, be amended by Ordinance No. 118 to read as follows:

CHAPTER I

Part 1. Definitions:

SECTION 11.1:

In this code, unless the context otherwise requires:

(1) "Adult" shall mean a person who is eighteen (18) years of age or older.

(2) "Code," "law and order code," or "tribal code" shall mean the Law and Order Code of the White Mountain Apache

Tribe, as adopted by the Tribal Council.

(3) "Council" or Tribal Council" shall mean the White Mountain Apache Tribal Council duly assembled.

(4) "Indian" shall mean any person of Indian descent who is a member of any recognized Indian Tribe under Federal jurisdiction. The word "Indian" as used in this code, importing the singular includes and applies to several persons, or parties.

(5) "Non-Indian" shall mean a person who is not an Indian.

(6) "Person" shall mean a natural person, Indian or Non-Indian, and where relevant, a corporation, partnership, or unincorporated association, such as the White Mountain Apache Tribe.

(7) "Property" shall mean both real and personal property.

(8) "Reservation" shall mean the area within the exterior boundaries of the Fort Apache Indian Reservation.

(9) "Tribal Judge" shall mean the Chief Judge of the Tribal Court of the White Mountain Apache Tribe or an Associate Judge.

(10) "Visiting Judge" shall mean a judge of another Indian Tribe, a former judge of the White Mountain Apache Tribe, a state court judge, or a justice of the peace who has been designated by the Chief Judge of the Tribal Court to hear and determine a case.

CHAPTER II

Part 1. Civil Actions:

SECTION 21.1 Jurisdiction:

The Tribal Court of the White Mountain Apache Tribe shall have jurisdiction over all civil suits wherein an Indian or a member of the White Mountain Apache Tribe or the White Mountain Apache Tribe is a party. In cases of divorce, the Tribal Court shall have jurisdiction where either the plaintiff or defendant is an Indian who is a bona-fide resident of the Fort Apache Indian Reservation.

SECTION 21.2 Acts Submitting to Jurisdiction; Process:

A. Any person, whether or not a member of the White Mountain Apache Tribe or a resident of the Fort Apache Indian Reservation, who in person or through an agent commits any of the acts hereinafter

enumerated, thereby submits such person, and, if an individual his personal representative, to the jurisdiction of the White Mountain Apache Tribe as to any cause of action arising from the doing of such acts:

(1) the transaction of doing business within the reservation;

(2) the commission of a tortious act within the reservation;

(3) the use or possession of any real estate situated within the reservation;

(4) contracting to insure any person, property or risk located within the reservation at the time of contracting;

(5) contracting with a resident member of the White Mountain Apache Tribe or the White Mountain Apache Tribe for the sale or purchase of

any goods or services knowing such contract is to be performed on or from within the Fort Apache Indian Reservation.

B. Service of process upon any person who is subject to the jurisdiction of the Courts of the White Mountain Apache Tribe, as provided in this section, may be made by personally serving the summons upon the defendant outside this reservation with the same force and effect as though summons had been personally served within the reservation.

C. Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

D. Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by Tribal Ordinance.

E. This section shall not be construed to extend the jurisdiction of the Tribal Court to suits where no party to the case is an Indian or a member of the Tribe or the White Mountain Apache Tribe itself.

The foregiong Ordinance was on March 04, 1981 duly adopted by a vote of 9 for and 0 against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article V, Section 1 (q) of the Amended Constitution and By-Laws of the Tribe, ratified by the Tribe June 27, 1958 and approved by the Secretary of the Interior on May

29, 1958, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

s: Ronnie Lupe
Chairman of the Tribal Council

Date of Approval: 03-23-81

s: Henry A. Dodge
Superintendent
Ft. Apache Agency,
Whiteriver, Arizona

s: Mary C. Endfield
Secretary of the Tribal Council

Letter from United States Department of the Interior, Bureau of Indian Affairs, Fort Apache Indian Agency, Whiteriver, Arizona 85941:

Mr. Ronnie Lupe, Chairman
White Mountain Apache Tribe
P.O. Box 1150
Whiteriver, Arizona 85941

Dear Mr. Lupe:

Ordinance No. 118 enacted by the Tribal Council on March 4, 1981 was approved on March 23, 1981. We are enclosing a copy of the approved Ordinance No. 118 together with a copy of the Phoenix Area Director's comments.

Sincerely yours,

s: Henry A. Dodge
Superintendant

Enclosures

Letter from United States Department of the Interior, Bureau of Indian Affairs, Phoenix Area Office, P.O. Box 7007, Phoenix, Arizona 85011:

Through: Superintendent,
Fort Apache Agency

Mr. Ronnie Lupe

Chairman, White Mountain Apache Tribal Council

Dear Mr. Lupe:

Ordinance No. 118 was enacted by the White Mountain Apache Tribal Council on March 4, 1981. Said ordinance amends the sections pertaining to jurisdiction to clarify for non-tribal courts the meaning of the words "Indian" and "person" as used in Sections 21.1, 21.2, 11.1(4) and (6) of the White Mountain Apache Law and Order Code and was adopted in accordance with U.S. District Court's decision in U.S. v. Kayle Adams,

CR 80-202-GLO-JAW.

With the exception of two typographical errors in Section 21.2 "B" and "E," we see no problem with the substance of the ordinance.

The Superintendent approved Ordinance No. 118 on March 23; however, the Superintendant's approval is subject to Secretarial review. We see no reason to rescind the Superintendent's approval; therefore, pursuant to authority delegated to me by the Commissioner of Indian Affairs, the Superintendents' March 23 approval is hereby affirmed.

Sincerely yours,

s: Alph H. Secakuku
Acting Asst. Area Director

CONSTITUTION OF THE UNITED STATES

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless ona presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice pur in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

25 U.S.C. §476

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the

Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior

to the submission of such estimates to the Office of Management and Budget and the Congress.

28 U.S.C. §1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute or the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000.00, computed without regard to

any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(June 25, 1948, c. 646, §1, 62 Stat. 930; July 25, 1958, P. O. 85-554, §1, 72 Stat. 415; Oct. 21, 1976, P. L. 94-574, §2, 90 Stat. 2721)

42 U.S.C. §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicalbe exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. §1979; Pub.L. 96-170, §1, Dec. 29, 1979, 93 Stat. 1284.